IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 299

Suit 1187/1997

Between

SG Industrial Pte Ltd

… *Plaintiff*

And

Eros Electrical Engineering & Construction Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Version No 1: 20 Nov 2026 (00:35 hrs)

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SG Industrial Pte Ltd v Eros Electrical Engineering & Construction Pte Ltd

[1998] SGHC 299

Suit 1187/1997
Warren Khoo L H J
04 September 1998

Judgment :

1. The plaintiff company, SG, was awarded a contract to build a neighbourhood centre for the Housing and Development Board at Bukit Panjang for $9.68 million. It was a three-storey building, incorporating shops, a supermarket, eating establishments, a wet market and a car park, among other things. This was the first HDB contract that SG had won. The defendant company, Eros, was invited to tender for a sub-contract for the sanitary, mechanical and electrical part of the project. SG and Eros had not worked together before. In fact SG's boss Mr Soo and Eros' Mr Tan hardly knew each other. The works for which Eros was asked to tender are comprehensively referred to as mechanical and electrical ("M&E") works. They included chiefly electrical, sanitary and plumbing works as well as mechanical and minor sewer works. Eros put in a tender at the sum of $2.52 million. Mr Soo in discussions managed to persuade Mr Tan to reduce it, first to $2.272 million and then to $1.83 million, telling him that SG had under-quoted for the main contract and holding out the prospect of SG and Eros working together on future HDB contracts.

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2. The sub-contract was contained in SG's letter of award dated 21 November 1995 and Eros' letter of acceptance dated 13 December 1995. It purported to incorporate the terms and conditions of the main contract in so far as they applied to the M&E works. Clause 2.0 provided as follows :

> This Sub-Contract is awarded on a back-to-back basis incorporated (sic.) the Main Contract terms and conditions on M&E Services only. You shall observe, perform and comply with all the provision of the Main contract entered into between HOUSING & DEVELOPMENT BOARD (Employer under the Main Contract), so far as they relate and apply to your Sub-Contract works....

3. The sub-contract did not provide for any commencement or completion dates for the sub-contract works. Instead, clause 5.0 of the letter of award merely referred to the dates as provided for in the main contract. It stated :

> The contract commencement and completion dates for this project are 6 October 1995 and 5 January 1998 respectively.

But work programmes exchanged at or about the date of the sub-contract showed when the sub-contract works were to begin and complete.

4. It was provided in clause 13 that Eros should complete the sub-contract works within the main contractor's programme of work. It provided that SG was entitled to alter the programme and Eros should adhere to the construction schedule to be issued from time to time as "we deem fit". The sub-contract provided that Eros should comply with all reasonable orders and instructions which SG might give from time to time in connection with the performance of the sub-contract works. It required Eros to submit for approval detailed shop drawings, samples and catalogues prior to the execution of the works. By clause

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11, Eros was required to make progress payment claims on a monthly basis, such claims to be submitted five days before the end of the month.

The trials and tribulations

5. Work on the project got off to a slow start; it also progressed very slowly. There were delays in SG's earthworks and substructural works because of variations ordered by the HDB and other reasons. Eros' works, which depended on the progress of SG's works, were also delayed. SG's master programme of work issued at the time of tender had to be revised in late May 1996. Mr Yong took over as SG's project manager in June 1996. He tried his best to make up for lost time, but with only limited success. In January 1997, he had to revise the master programme again. He also demanded that Eros prepare a programme for the sub-contract works in line with the revised master programme. He and his staff intensified the pace of work, issuing instructions to Eros to start work wherever site was available. This led to quarrels about the sequence of work and other difficulties. SG was unhappy with Eros' slowness in complying with these instructions. Mr Yong and his staff also pressed Eros to make submissions of samples, catalogues specifications etc. of the M&E equipment and components. Some of these instructions had first been given in the latter part of 1996. SG was unhappy about what it saw as slowness in Eros' response to these instructions.

6. On Eros' side, there was simmering discontent with SG's tardiness in the matter of certifying Eros' progress payment claims; Eros was unhappy with the amount of the few progress claims SG did certify. There was also a bill for underground rainwater downpipe which Eros had presented in August 1996 and which SG ignored for months until Eros threatened to stop work and went to

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solicitors. A meeting between Mr Tan and Mr Soo in February 1997 to discuss the general question of progress claims did not result in any lasting improvement.

The termination of contract

7. Clause 33 of the sub-contract provided that SG might terminate the sub-contract if Eros should make the following defaults :

> (a) if without reasonable cause it wholly suspends the sub-contract works before completion;
>
> (b) if it fails to proceed regularly and diligently with the sub-contract works
>
> (c) if it refuses or persistently neglects to work according to [SG's] instructions.

8. SG decided to bring their difficulties with Eros to a head. It had long made up its mind to dismiss Eros. As early as January 1997, Mr Soo had invited tenders for the electrical part of the works. He was put off by the very much higher cost he would have to pay for the electrical works (about $1.4 million compared with about $0.92 million in Eros' contract). He decided to hold on. In May, Mr Soo had meetings to try to get Eros to speed up. But there was no improvement. On 4 June 1997, SG wrote to Eros saying that it was disappointed with Eros' lack of response to the numerous reminders regarding outstanding works and submissions. SG's letter set out a list of some five outstanding submissions items and some five items of outstanding work. It required Eros to make good its shortcomings within three days. Eros replied on 9 June. It said that the delays had been caused by SG's delays in its works and that, in any case, the outstanding works and submissions were not critical. Eros also complained, again, about SG's defaults in the matter of certifying and paying

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Eros' progress claims. On 10 June 1997, SG, through its solicitors, served a notice of termination of the sub-contract, purportedly under clause 33 (b) and (c) of the sub-contract, set out above. Within days, SG started this action.

The claims and counterclaims

9. SG claims damages arising from termination of the sub-contract, in the form of additional cost it has had to incur to have the M&E works completed. It also claims damages for allegedly defective work done by Eros. Eros, on the other hand, contends that the purported termination of the sub-contract was wrongful, and counter-claims for damages for loss of profit etc.

10. SG's complaints fall under three broad headings : failure to comply with instructions to proceed with work; failure to comply with instructions to make submissions; and failure to proceed regularly and diligently by reference to the construction programmes. I deal with the last first.

The general work sequence

11. The M&E works included works underground as well as works above. The underground works, such as utility, sanitary and telecoms piping and inspection chambers, had to be done first. But these works could not be carried out until SG had carried out the initial earth and substructure works, i.e. excavation and piling works. These were critical items of work, and delays in progressing them would have the effect of delaying both SG's and Eros' subsequent works.

12. Mr Tan of Eros explains that for the underground M&E services, it is usual practice to start work only when the pilecaps have been completed and fixed gridlines have been provided in the plans. The gridlines and the pilecaps are

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then used as reference points for the installation of the underground M&E works. The above-ground M&E services consisted of things like sanitary plumbing electrical and gas pipings and installations, as well as television and public address (PA) systems. These works could not commence until after floor (or ceiling) slabs had been constructed or until the brick walls were up. This is because the M&E trunkings, pipings and other fittings and accessories had to be fixed to the building structure. The ceiling slabs also would serve to protect the on-going M&E works from weather. Floor (or ceiling) slabs and brick walls were within SG's responsibility. If SG's work in these areas slowed down or stopped, then Eros' M&E works would follow suit.

13. Mr Ness, Eros' expert witness, expresses the matter in terms of the critical path of the project. He says that the critical path in this project would pass from the substructure works of piling and pile caps through the ground beam to the reinforced concrete (r.c.) structure. Once the r.c. structure was up, it would pass into the brick work. On completion of the brickwork, there would be many concurrent activities that could be commenced and carried on. A delay in the completion of any work on the critical path would lead to delay in the overall completion of the project.

The construction programmes : the original master programme

14. The original master programme for the project as a whole was issued by SG at the time of tender, in November 1995. For the M&E works, it provided as follows :

Underground M&E works

Start : 22 December 1995

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Finish : 5 March 1996

Total : 3 months

Above-ground M&E works

Start : 22 December 1995

Finish : 14 January 1997

Total : 13 months

Testing, commissioning, inspection

Start : 15 April 1997

Finish : 28 June 1997

Handover

: 5 January 1998

15. At SG’s request, Eros proposed a detailed programme for the M&E works ("1st sub-programme") in accordance with this master programme. The master programme, as shown above, provided for the same start date for both the underground as well as the above-ground works. This was physically impossible. Furthermore, the progress at site showed that the 22 December start date for the underground works was also not feasible. Eros’ took these factors into account, and the 1st sub-programme provided as follows :

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Underground M&E works

Start : January 1996

Finish : May 1996

Total : 5 months

Above-ground M&E works

Start : May 1996

Finish : October 1997

Total : 18 months

Testing, commissioning, inspection

Start : October 1997

Finish : December 1997

Handover : December 1997

16. This programme was accepted by SG. It can be taken as the programme agreed at the commencement of the contract.

First revised master programme

17. As stated above, the critical activities for SG at the initial stage were the substructure works of earth works through to pile caps. There is no dispute that

there were serious delays in these works. As a result, the original master programme, and in respect of the M&E works, the 1st sub-programme, became obsolete. Eros pressed SG for a revision of the original master programme. A revision was issued in late May 1996. At this date, SG still had not completed its substructure works, as it should have done under the original master programme. The revised programme (the "1st revised master programme") provided as follows :

Underground M&E works

Start : 15 April 1996

Finish : 12 August 1996

Total : 4 months

Above-ground M&E works

Start : 13 August 1996

Finish : 16 September 1997

Total : 13 months

Testing, commissioning, inspection

Start : 17 September 1997

Finish : 31 October 1997

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Handover

Start : 1 November 1997

Finish : 30 November 1997

The second revised master programme

18. Mr Yong took over as SG's project manager in June 1996. There were still delays. In January 1997, he prepared another revised master programme ("the 2nd revised master programme"). At this time, SG was still carrying on the sub-structure works, and Eros' underground works were still being delayed. But this revised programme did not provide for the underground M&E works; only the above-ground works were provided for. It showed :

Underground : Nil

Above-ground M&E

Start : 2 January 1997

Finish : 15 August 1997

Total : 7.5 months

Testing and commissioning

Start : 16 August 1997

Finish : 30 August 1997

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Total : 15 days

Inspection

Start : 23 September 1997

Finish : 18 October 1997

19. Mr Yong required SG to provide a detailed programme of the M&E works within the time frame set by the 2nd revised master programme. Eros did so. Much of the dispute in this case, so far as work is concerned, turns on the progress (or lack of it) of the above-ground works in the period covered by this latest revision of the master programme, i.e. from January 1997 to the date of termination in June. SG's complaint is that the progress of Eros' works fell seriously short of the target set by the revised programme. Eros' answer is that this 2nd revised programme seriously reduced the amount of time available to Eros to carry out the works as originally provided; it also adversely altered the timing of the above-ground works. In any event, Eros contends that its failure to progress the works according to the revised programme was largely due to SG's delays in the superstructure works.

Eros' complaint : shortening of time

20. Eros complains that the time available to it to do the sub-contract works was progressively reduced by the revisions of the master programme. It seems to me that this is well borne out by the tabulations above. The reductions in both the overall time and in the time for the above-ground works resulted from substantial postponement of the start dates for Eros' works and at the same time the advancing of the finish dates. It is not disputed that the postponement of

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Eros' start dates, both for the underground and for the above-ground works, was necessitated wholly or at least largely by SG's delays in the substructure and superstructure works. SG has not explained why the finish date had to be advanced. Since Eros had been prevented from starting its work by matters within SG's responsibility, Eros, if anything, should have been given more time, not less. SG itself, it has now transpired, was given extensions of time as the delays had been due largely to changes ordered by the HDB, although SG might not have known how much extension it would get at the time of the 2nd revised master programme.

21. So, Eros' complaint that the time available to it to do the contract works was "squeezed" is, on the face of it, fully substantiated. It was well said by Vanghan Williams L. J. in **Wells v. Army & Navy Co-operative Society** [1902] 86 L. T. 764 that :

> "If in the contract one finds the time limited within which the builder is to do the work, that means not only that he is to do it within that time, but it means also that he is to have that time within which to do it"

See also **Glenlion Construction Ltd v. The Guinness Trust** [1987] 39 BLR 89

22. Eros not just had the duty to complete the contract works; it had the right to the amount of time allocated to it by the contract to do so. The purported shortening of the completion date itself is a infringement of this right. I can see nothing in the terms of the sub-contract that can be fairly construed as taking away this basic right of Eros'.

23. Clause 13 of the sub-contract provided as follows :

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> Time is essence in this project. You shall complete you Sub-Contract works within our Main Contractor's Programme. However, the Main Contractor reserves the right to alter the programme and you shall adhere to our construction schedule that will be issue to you from time to time as we deem fit. In this respect, you shall carry out overtime or mobilize more resources as and when directed by the Main Contractor and you also agree to work on Sunday and Public Holidays to meets the Main Contractor's Programme. No claim of overtime, mobilization or standby time shall be entertained.

24. Read literally, it might seem that this clause gave SG the liberty to issue whatever construction programme it deemed fit, even to the extent of curtailing the contract period originally agreed. However, SG does not contend this. Neither does it contend that the 2nd revised master programme and Eros' 2nd sub-programme amounted to a variation of the contract in respect of the completion date, or created any estoppel.

The timing

25. What is even more important in this case is the shift in the start date for the above-ground as well as underground M&E works. For the above-ground works, which are subject of the disputes, as illustrated in the tables above, the original programme envisaged a start date of May 1996 and a completion date for the above-ground M&E works by June 1997. SG says that the May 1996 start date was physically not feasible; it should be July 1996. Because Eros could not have proceeded with these works until the 2nd-storey slab had been completed, and this had been scheduled for completion only in July 1996. Assuming SG is correct, the position is still that whereas under the original programme Eros could have started in July 1996, under the 2nd revised master programme, most of the above-ground M&E works could not start until January 1997 or much later.

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26. Such delays in the start dates in a contract of a mere 2 years affects the position of a contractor quite fundamentally. There must be a qualitative difference between being able to start in May or July 1996 and not being able to start until months later. It means that the amount of time available to do the work and the amount of time in which to catch up for any delays are substantially reduced. This of course works to Eros' disadvantage, particularly as SG at the same time purported to advance the completion date. Furthermore, it has implications on Eros' ability to plan its work and to carry it out in an efficient and economic manner, a right which any contractor undoubtedly has.

27. SG makes the point that on its analysis, the time allocated for the above-ground works, which form the main subject of the disputes, was six months both in the original programme and in the 2nd revised programme. I am not sure whether SG is quite right in saying this. The tables set out above show that the amount of time allocated for the above-ground works was in fact progressively reduced and by wide margins. Even if SG is right about the amount of time available, it seems to me it misses the point that the timing was fundamentally altered to Eros' disadvantage.

28. It must also be borne in mind that the contract was for the execution and completion of the works as a whole, above-ground as well as underground. The amount of time and the timing of the above-ground works and the effect they had on the contractual rights and obligations of the parties must be seen as a totality. SG's contention, focused on just the amount of time allocated for the above-ground works, appears to me also to miss the point.

29. SG's 2nd revised programme thus fundamentally altered the amount of time available to Eros to complete its works and the programming of the works; it

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also in effect foisted on Eros the responsibility to make up for delays in the progress of work due to delays for which Eros was not in truth responsible. There is also evidence that SG itself failed to live up to the latest revision of the master programme, and some of its delays impinged on Eros' ability to progress according to the revised programme. In these circumstances, I do not think that it is fair and reasonable for SG to rely on the 2nd revised master programme as a yardstick to measure Eros' progress in accordance with the contract. Failure on the part of Eros to progress was not necessarily a breach of its obligation to proceed regularly and diligently. As Brown L J in **West Faulkner v. London Borough of Newham** [1994] 71 BLR 6 at 12 said, quoting a passage from a professional journal :

> "failure to comply with an agreed programme may be some, but certainly is not conclusive evidence of failure to proceed regularly and diligently. Thus the failure to comply with the programme may be due to the contractor's default, or a cause of delay (warranting an extension), or it may be that the contractor is proceeding at a rate and in a manner which satisfies his obligation to proceed regularly and diligently even though it differs from the programme."

Failure to comply with instructions

30. SG complains that Eros failed, firstly, to comply with SG's instructions to proceed with some of the M&E works, and secondly, to comply with SG's instructions to make submissions for approval of samples, catalogues and specifications of components of the M&E services required to be installed.

Instructions to proceed with work

31. Clause 20 of the sub-contract provided as follows :

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> You shall comply with all reasonable orders and instructions which we may give from time to time in connection with the performance of your Sub-Contract works. Should there be any instruction issued by us to you to carry out any item of work, and should you fail to comply with such instruction within three (3) days or any other period which to our opinion will hold up the works, we reserve the right to appoint others to perform the work at your expense without vitiating the Sub-Contract or relieving you of your responsibilities and obligations under the Sub-Contract.

32. SG says that Eros failed to comply with SG's instructions to :

> (i) Commence electrical installation work at the car park (at 2nd storey)
>
> (ii) Deliver busbars to site
>
> (iii) Proceed with sanitary works at gridline B/7-12 (front of the building)
>
> (iv) Commence electrical installation at the mock up shop unit at the 2nd storey
>
> (v) Complete the mock up toilet at eating establishment no. 1 at 1st storey
>
> (vi) Rectify the mis-aligned floor sumps at the wet market on the 3rd storey.

33. Almost all the complaints relate to instructions or reminders given to Eros in March, April and May 1997. It seems to me that item (i) (electrical works at the car park) is the most substantial item, and is worth referring to in some detail. This item included the installation of conduits for electrical and other services such as the fire protection system and busbars. SG expected Eros to tailor its electrical works to SG's progress in the ceiling work. SG says that as early as January, Eros had been verbally told to commence its electrical work as soon as the skimming work got under way. The plastering and skimming started about the end of February. By early March, SG had completed about half of the

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plastering and skimming. By early April, the whole of the car park ceiling had been plastered and skimmed except for a small area.

34. On 6 March, SG complained to Eros that Eros had made no progress in the electrical works. SG required Eros to start work by 8 March. But despite reminders, no electrical work in the car park had been done as of the date termination.

35. The position is as follows. The 2nd revised master programme did not show specifically when electrical works at the car park were planned to start. It only provided generally that electrical works for the project as a whole were to start on 22 February and finish on 15 August. Eros' 2nd sub-programme contained more detail. It provided for electrical works generally on the 2nd storey (where the car park is) as starting on 1 February and ending on 25 July with the installation of lighting and accessories. For laying of conduit and wiring, the dates were 1 February to 2 April, and for the installation of the busbar trunking 16 March to 20 April.

36. The 22 February start date in the master programme appears to have been predicated on the completion of the skimming of the ceiling at least over a substantial area (GL 7 to 12) which was planned for 18 January. There is no evidence when the skimming of the area GL 7 to 12 was completed. There are photos showing the state of the ceiling of the car park, but they were all taken in May. Mr Yong says in evidence that at that time the plastering and skimming in this area was all complete; he says nothing of its state as of 6 March when SG gave written instruction to press Eros to commence work. Judging from the state of the skimming work in the remaining area of the car park ceiling as of May (when the photographs were taken), it seems unlikely that the skimming

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of the ceiling in the GL 7 to 12 area was anywhere near completion. It seems from Mr Yong's own evidence that what he expected Eros to do was to follow at the heels of the plasters, and install the trunking and other electrical things as the plasters' work proceeded, and not to wait for any substantial area (such as GL 7 to 12) to be completed before starting work.

37. There has been some argument whether or not the electrical trunkings and conduits could be installed before the car park ceiling was painted after it was skimmed. Eros says that construction logic requires that they be fixed after the painting, as otherwise they were liable to be messed up by the painters' brush. SG says no; the painter just needed to be more careful. Mr Tan of Eros proferred the additional reason, which does not appear convincing, that the piping might get corroded by the cement ceiling if it was not painted.

Delivery of busbars

(item ii)

38. Related to the electrical works in the car park is the issue about the delivery of busbars to site (item ii). Busbars, as I understand it, are rigid high-capacity electrical conductors. They are specially manufactured to the lay-out and contours of a site. Eros had ordered them and the material had been lying in the suppliers' warehouse since December 1996, ready to be taken to site and installed. SG's complaint is that Eros failed to comply with SG's instruction to bring the material to site. The instruction was first given on 12 April, and repeated on various dates in April and May. There were disputes as to where the material could be stored on site and the parties blame each other for the disputes not being resolved. As of the date of termination, the material remained in the

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suppliers' warehouse. It was eventually taken over by the new M&E sub-contractors appointed by SG.

Sanitary works at front of building

39. Item (iii) (sanitary works at front of building) involved the construction of waste sumps underground. SG's complaint is that the site for this part of the work was given to Eros on 4 April, and the urgency of the work was brought to Eros' attention by letter of that date. Eros failed to carry out or delayed in carrying out the work despite repeated reminders. As of the date of termination, it had done only very minor preliminary excavation work. Eros' explanation for not doing the work, which seems to be not entirely convincing, is that its work was hampered by vehicular traffic delivering materials to the plaza area, but in any event the work did commence in May 1997, although later than the date instructed.

Electrical works at mock-up shop unit

(item iv)

40. The mock-up shop unit was required by the HDB to serve as a model for other shop units. At a meeting on 26 January 1997 at the HDB, HDB officers made known to SG's and Eros representatives that the mock-up should be completed for inspection by the HDB Architect by the end of April, and by the Chief Architect on 1 May.

41. At a meeting on 16 March, SG instructed Eros to commence all electrical works including electrical works in the mock-up shop unit by the following week. Mr Yong's evidence is that in April, SG became concerned, as the work

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had hardly started, and submissions such as those for the meter board, light fittings etc. had not been made. On 17 April, SG wrote to Eros, reminding it of the end-April deadline. On various dates in May and on 2 June, HDB officers themselves told Eros to complete its work. SG's complaint is that as of the date of termination, Eros had not done any electrical work at the mock-up unit as instructed.

42. Electrical works for the mock-up shop unit were not provided for in any of the programmes. As stated earlier, the 2nd revised master programme merely provided for electrical works generally to commence on 22 February and finish on 15 August.

43. It appears that as far as the mock-up shop unit itself is concerned, the HDB architect was primarily interested in the positioning of light fittings, the television and the electrical isolator. The idea was that the positions of these electrical accessories, once approved, would be followed for other shop units. However, at the trial, there seemed to be suggestions by Mr Yong that the mock-up work also included electrical conduits and trunkings in the false ceiling above the corridor outside this row of shop units, and there was the same argument about the detailed sequence of work, i.e. painting before or after conduit, or at all.

Sanitary works in mock-up toilet (item v)

44. Like the electrical works in the mock-up shop unit, sanitary works for the mock-up toilet were also not specifically provided for in the programmes. The 2nd revised master programme merely provided generally that sanitary works for the project were to commence on 2 January and to complete on 16 July. The

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2nd sub-programme provided for a commencement date of 15 January and a finish date of 31 May for the sanitary works on the 1st storey. There are provisions for later dates for toilets on the other floors. As in the case of the mock-up shop unit, the HDB required the mock-up toilet to be done so that the positions of various accessories could be followed for other toilets and HDB also required it to be done by the end of April.

45. SG's complaint is that on 21 January 1997, Eros was told to start its M&E work in the toilet area on the 1st storey, especially the mock-up toilet, which should be completed early. Eros was told to start on 23 January. Eros was also told to complete the piping work at the partition walls before the Chinese New Year (7 and 8 February). Eros, however, did not start any work at all until the end of February. As at the date of termination the M&E work at the mock-up toilet had not been completed, and the M&E work at the other toilets was even further behind.

46. The parties blame each other for this work not being done. The water and sanitary pipes had to be run through the partition wall and between that wall and a low wall. The argument is whether SG should have done both walls before Eros could be expected to do the piping work. SG insisted that Eros should do the first set of piping after the completion of the partition wall before the low wall was constructed. Eros thought, or think, otherwise. The long and short of it is that the mock-up toilet was not completed by the date required by the HDB, and as of the date of termination it was still not completed.

Rectification of misaligned floor sumps

(item iv)

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47. This relates merely to two floor sumps at the wet market on the top floor which Eros had installed slightly out of alignment. SG's complaint is that despite instructions given at meetings on 12 and 17 April to reposition the sumps, Eros failed to do so.

48. Eros does not dispute that the sumps were not properly done. But according to Eros the Ministry of the Environment had no objection to them. Mr Yong of SG also admits that as of the date of trial the sumps had still not been rectified. Eros says this suggests that it was not a matter of any great moment.

The wood and the trees

49. What does one make of all these instructions and arguments? As a starting point, it seems to me that one should bear in mind that Eros contracted as an independent contractor to do and complete the M&E works within a certain period of time. Within this general time-limit and the general timings and sequences of the construction programmes, Eros had the right to plan and carry out its work in the order it thought best. As an independent contractor, Eros also had the right to decide the manner in which any item of work was to be carried out, and the detailed sequences in which it should be carried out. In an ideal world the main contractor (himself or through his sub-contractors) would carry out his part of the work according to an agreed programme, and the sub-contractor would do likewise. Instructions such as those which SG issued in this case would be hardly necessary. In the real world of a building project, involving the participation of many trades, coordination of work among the various sub-contractors is necessary or essential. However, instructions as to where and when to start work or how work is to be done should still be kept

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within the bounds of the general rights and obligations of the parties under the contract. They should not be the normal mode of performance.

50. Because of previous delays, caused largely by SG's delays, Mr Yong had the unenviable task of trying to make up for lost time. Much of the work which should have been done in 1996 was pushed to 1997, as evident from a comparison between the 1st and 2nd revised master programmes. Mr Yong drew up the 2nd revised master programme as a guide to enable him to co-ordinate and speed up work. However, SG itself was not able to live up to the timing provided in that programme in respect of its own work. SG could not afford the orderliness underlying the sequences of work laid down in even this latest revision of the master programme. Orderliness gave way to the expediency of giving instructions requiring Eros to follow closely the progress of other works. The difficulty with the electrical works in the car park is a case in point. SG could not afford to allow Eros to have a substantial area (GL 7 to 12) ready before installing the conduits and so on as envisaged in the programmes. This was the reason as I see it for its insistence that Eros follow closely the plasterer's work and its insistence that the conduits and other things be installed before the ceiling was painted, something that seems to go against logic and common sense. The difficulty with the sanitary works in the toilet is another example. Here, it seems that SG was also being intrusive in purporting to give Eros instructions to proceed in a sequence which Eros could not accept. It treated SG more like a servant or agent rather that an independent contractor with responsibility of its own. But for the fact that SG was scurrying about to make up for lost time, there is no reason that I can see why Eros should not have been left to do the work in the sequence it preferred, having regard to the fact that Eros' ultimate responsibility was to get it done. Eros presumably did have the expertise, and need not have to rely on SG telling it how to do it.

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51. SG makes much of the fact that the mock-up toilet and shop unit were required by the HDB to be done by the end of April. But it seems that it was the aesthetics of the positioning of various fittings that the HDB architect was more interested in, rather than any considerations of criticality in terms of the completion of the project as a whole. The mock-ups appear to have been nothing but part, although the initial part, of the progress of the electrical and sanitary works. There is no evidence that the HDB made much of the failure or delay in the work on the mock-up units.

52. The failure to bring the busbars on site was not a matter of any significance. The material was there safely in the suppliers' warehouse, and I do not see why SG should have insisted that it be brought to site. As for the sanitary works in front of the building, Eros' explanation sounds a little far-fetched, but, again, it has not been shown that the delay was anything of significance in the critical path of the project.

53. It is quite clear that the flurry of instructions in these few months before SG decided to terminate the contract was necessitated largely by SG's attempt to catch up for delays for which Eros was not responsible, and to do so within a telescoped time-frame. Eros was simply told to work whenever and wherever it was physically or even theoretically possible for it to do work. Mr Tan of Eros says :

> "They moved us here, they moved us there. It was very difficult for us to do our work in an orderly way".

SG's counsel at the hearing put forward the view that SG had the right to tell Eros to do work in whatever order it thought fit. If he had in mind clause 20 of the contract, I doubt if that clause can be construed as giving SG the right to

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disturb the basic right of Eros to plan and carry out its work with same degree of orderliness, due allowance being made for the practicalities of the progress of other trades on site. SG did attempt to comply with Eros' instructions and succeed in some instances, but the failure or delay in carrying out SG's instructions in the circumstances could not, in my view, amount to breaches of the contract, let alone repudiatory breaches, as the reasonableness of SG's purported exercise of the power to give instructions in the circumstances is open to serious doubt in the first place.

Instruction to make submissions

54. Clause 22.0 of the sub-contract provided as follows :

> *22.0 SHOP DRAWINGS/SAMPLES/CATALOGUES*
>
> *If required, full detailed shop drawings, samples, catalogues, etc., shall be submitted to the Architect/Consultants for approval prior to the execution of work and you are to allow a minimum of four (4) weeks for the Architect/Consultants to check and approve the shop drawings. In any case, you shall submit shop drawings two (2) weeks hereof. Failure to produce the shop drawings in time may result in construction errors and you are to bear all costs for any delay and rectification work that may be required. As-built drawings to be submitted upon completion of the*

works with Professional Engineers endorsement if required by HDB to their requirement.

55. Nothing turns on the provision about shop drawings or as-built drawings. The dispute concerns SG's instructions to submit samples, catalogues and specifications of equipment and components to be incorporated in the M&E works.

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56. The HDB issues lists of approved materials. For these pre-approved materials, it was in principle not necessary to seek HDB's approval. It was only necessary to notify the HDB the brand of the material proposed to be used. It seems, however, that there were cases where even though an item was on the approved list, HDB would as a matter of fact still require submission to be made.

57. SG's complaints relate to various components of the electrical works (cables, light fittings, rippler control), water and sanitary works (booster pumps and valves, grease traps), fire protection and lighting protection. There is also the special case of the chemical spray system, which was a variation of contract. SG complains that Eros failed or delayed in responding to its instructions in respect of all these and other submissions. Appendix 3 to SG's further and better particulars set out in detail the dates when instructions and reminders were given and, in respect of the delay complaint, the dates when submissions were made. The appendix shows many instances where no submission had been made at all as of the date of termination.

58. It is not necessary to go into the details of each complaint. I said earlier that Eros as an independent contractor was obliged to carry out and complete the M&E works in accordance with the contract, and in general there was no reason not to leave it to carry out its work in the manner it deemed appropriate. Much of what I have said about the instructions to proceed with work applies to this head of complaint. Eros would be right to time its submissions with the general sequence of its work, since the submission and approval were part and parcel of proceeding with its work. Of course, Eros should allow HDB officers sufficient time to consider its submissions, depending on the complexity of the subject. However, it appears from Appendix 3 itself that quite a number of the instructions subject of SG's complaint were issued as early as August 1996,

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long before the component or equipment could conceivably have been required to be installed. It is a matter of some puzzlement why SG should have given instructions so early.

59. The timing, frequency and the sheer volume of instructions seem to be at odds with the basic scheme of the rights and obligations of the parties under the contract I referred to earlier. Although reminders by SG might be called for in the event SG overlooked something, I find it difficult to see why SG should take on the responsibility of directing, or assume the right to direct, when Eros should make particular submissions. I find even less reason for holding that failure to comply with such instructions and reminders per se would give rise to a breach of the contract. These failures are meaningless unless related to the sequence of work planned or executed. No effort has been made to correlate them.

60. It seems that SG's grievances about the matter of submissions had more to do with their annoyance in not getting prompt responses from Eros to the voluminous instructions and reminders it gave to Eros rather than any larger considerations of the rights and obligations of the parties under the contract.

Chemical spray system

61. I should perhaps say a few words about the chemical spray system. As I said, this was not part of the original contract. The chemical spray system was required at the bin centre. As early as October 1996, Eros had told SG that it was not prepared to undertake this as it was not part of the contract and that it was unable to do it because of its limited resources. This was repeated in December 1996. It appears that Eros was reluctant to undertake this variation work as SG had been stalling on the payment for the rainwater downpipe work,

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also an extra item of work, for which a bill had been rendered in August 1996 (more below). However, in February 1997 when the parties reached a compromise on that bill, Eros also agreed to submit for the chemical spray system. But Eros had to get specialist suppliers to do the work. It submitted drawings on 22 April, but HDB found it unacceptable. HDB officers made comments. Eros got the suppliers to discuss the details with the HDB so that a fresh submission could be made. But before this could happen, SG terminated Eros' contract. SG then got in direct touch with the suppliers and submitted its proposal on 3 June. This was approved by the HDB shortly thereafter.

62. SG's main grouse against Eros was that Eros took six or seven months to get this item off the ground. However, the submission was made and approved eventually, and SG has not shown what harm the delay had caused to the project.

Interim payments dispute

63. Eros says that SG itself was in serious breach of the contract in the matter of progress payments. The complaint is basically two-fold: first, irregularity of SG's certification of its claims and, second, inadequacy of SG's certifications. As stated earlier, clause 11 of the contract required Eros to make progress payment claims on a monthly basis. It is not disputed that SG was, correspondingly, required to certify such claims also on a monthly basis. Eros made its first claim in May 1996. Between then and June 1997, when the contract was terminated, it made claims every month, except for December, January, February and April. The undisputed evidence is that from the July claim onwards, there was consistent delay on the part of SG in certifying the claims submitted. Progress claims for July and August, submitted on 26 August, were not certified until 7 October. Eros was paid a sum, I think, of $42,512 on

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11 October. Claims for September, October and November were each submitted on or about the 25th of the month. None of these were certified by SG. SG just made an "advance" of $30,000 to Eros on 22 November. No claim was made for December. But on 15 January SG purported to certify for work done to December. But the certified sum (on a cumulative basis) was less than the amount certified for August. So no payment was made. Eros made no claim in January and February, but the claims for September to November were still outstanding. Eros had threatened to suspend work and had gone to solicitors over this bill. The position was so badly felt by Eros that Mr Tan went to see Mr Soo some time in February. He complained about delays and under-payment. Mr Soo's reply was that Eros had been overpaid. To test that, Mr Tan suggested that since the sub-contract was back-to-back with the main contract, SG should produce the claims that SG had submitted to the HDB and HDB's certifications. Mr Tan promised to do that, but failed to do so. It was only in the middle of the trial that these documents were produced.

64. The February meeting appears to have had some effect, but it did not last long. The March claim was certified unusually promptly on 31 March. No claim was made in April. The claim for May, submitted on the termination of the contract, was never certified. SG's explanation for the delays in certifying Eros claims is that for the months in question SG was entitled to make deductions for material supplied to Eros. Taking that into account, it says Eros had been overpaid. It seems to me that this can hardly be a good excuse for not certifying. Certification is of the value of the work done. It was something that had to be done on every progress claim made by Eros, just as the HDB would, and did, certify every claim made by SG. Until a sum was certified, there was nothing from which any deduction could be made, and one could not begin to have an argument whether Eros was in credit or debit. Even if the net amount after the

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deductibles would be a negative figure, SG could or should still have certified Eros' claims. In fact, the few certifications from December onwards all show a debit figure.

65. That deals with the complaint about delay in certification. As for under-certification, the complaint is that the amount SG allowed to Eros was probably less than the amount the HDB allowed to SG for the M&E works. No direct comparison between amounts is possible or meaningful on the basis of the claim and certification documents available, as the contract sums are different and HDB's certification is a global sum for the whole main contract, and no separate certification is made for M&E works. However, some useful comparison can still be made on the basis of the percentages of completion of areas of work claimed by SG against the HDB and the percentages of completion certified by SG on Eros' claims. There appear to be significant disparities between the figures in the two sets of claims.

66. Sanitary works were the major component of claim in the relevant period. I shall take just one or two examples. For December 1996, SG's claim shows sanitary works in the main building as 51.6% completed, but SG purported to certify only 33.8% on Eros' claim. For March 1997, the corresponding figures were 60% vs. 43%. There were similar, but smaller, disparities in the figures for sanitary works at the covered car park.

67. Mr Yong of SG attempts to explain the significant difference between what SG certified to Eros and what SG claimed from the HDB by saying that SG probably overclaimed from the HDB. He says the fact that SG overclaimed from the HDB does not mean that SG should allow Eros also to overclaim. He also

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says that SG usually did not get all its claimed amount certified. For February 1997, for instance, it got only 18% of what it claimed.

68. It seems to me that significant over-claims by SG were unlikely. In the first place, it seems to have been the practice for SG to check with HDB's site staff before submitting a progress claim. Secondly, an analysis of the global cumulative amount claimed by SG on each progress claim and the global amount certified, shows that for most of the claims, the margin of error was rather small. A comparison of the net claimed value of work done in a particular month with the net certified amount shows that SG almost consistently got 90% or more of its claims, especially for the period up to and including December 1996. The 18% for February, mentioned by Mr Yong, was one single exception. There is no reason to think that the general position is less true of the M&E works than of other works. The preliminary checking with HDB site staff must have had the effect of keeping claims generally within bounds.

69. Progress payments are meant to give the contractor regular and periodical allowances for work done and material delivered to site to enable him to have the necessary cash flow to continue. They have been well described as the life blood of the business of a contractor. The regularity of progress payments is as essential to a contractor as their amount. Here, in this case, SG seems to have taken liberties with its obligation to certify Eros' claims. The evidence shows that SG's own monthly claims were certified promptly by the HDB, usually within days. But when it comes to certifying Eros' claims, SG would sit on them for weeks and months on end. This alone was quite unfair.

70. Interim claims and certifications are not intended to reflect down to the last dollar the amount of work actually done. It is a rough estimate, not an exact

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measurement. Mr Yong concedes that this was the approach of the HDB in regard to SG's claims. However, when it comes to Eros' claims, it would seem that SG adopted a different yardstick in its own favour. Mr Yong candidly admits (according to my notes) : "The HDB staff did not go as detailed as we did." I have to mention in this connection that, while SG's contract with the HDB did not provide for retention sums, in the Eros' contract, there was provision for a 10% retention.

Effect on Eros

71. The tight rein on progress payments must have had unfortunate consequences for a contractor in Eros' position. Eros was working on tight margins. Its tender was bargained down to a point where, if everything had gone smoothly, its profit margin would have been only about 10%. However, with the provision for a 10% retention sum, even if Eros got paid regularly and fully for work done, it would have been barely enough to reimburse its outlays. The tight certification practices were not at all helpful. They amounted to increasing the retention.

72. The crash programme that SG put in place from January 1997 called for intensified work. That means more manpower, more outlays. Mr Soo complains that Eros had only a few workers on site, and he demanded that it put on at least 30. It seems to me that SG, being in breach of its payment and other obligations (as dealt with earlier), was hardly in a position to make such demands.

The rainwater downpipe

73. As stated above, Eros' grievances were compounded by a long outstanding bill for the rainwater downpipe (RWDP). I now deal with the matter, first as an

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irritant in the relationship between the parties, and then as an item of claim in these proceedings.

74. The RWDP consisted of two components - the PVC piping above ground and ductile iron piping underground. At the time of tender, it appears to have been assumed by both parties that the entire system was not included in the tender. Eros was asked to do the work as a variation item. Eros proceeded with the underground portion, and in August 1996 it presented a bill for $36,494.96. As stated earlier, SG delayed in attending to it. When pressed, SG responded in November by asking Eros to justify the quantity and rates used. Then in December, Mr Yong discovered that the underground portion was in fact shown in the tender drawings. SG then took the position that it was not liable for the cost at all. At the meeting in February 1997 between Mr Tan and Mr Soo mentioned earlier, a compromise was reached, by which SG agreed to pay 50% of the cost but based on HDB rates. However, SG never made any payment.

75. The manner in which SG dealt with this matter did not add to a good working relationship. Whatever the tender drawings might show, it seems clear that the parties had agreed that the RWDP as a whole was an extra item. This is confirmed by the fact that no objection in principle (as opposed to quantum) was made until Mr Yong's discovery in December. Eros having gone on to do the work in good faith, it was justifiably aggrieved that there was so much difficulty getting paid.

RWDP as a claim in this suit

76. Eros claims the full invoice amount of the RWDP bill on the ground that SG has repudiated the compromise by not paying the agreed amount promptly.

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Although sympathetic to this argument, I am unable to accept it. It appears from the minutes of the meeting that Eros had to submit the "breakdown cost" within a week, presumably according to HDB rates. However, there is no evidence that Eros ever did so, or that a revised bill was ever sent. It would seem that the delay in implementing the compromise was not entirely SG's fault. As there has been nothing to vitiate the compromise, I think it should be respected. On the basis of the compromise, the amount payable is $8,690.17. There is no dispute about a subsequent bill for the above-ground portion of the RWDP for the sum of $5,363.

Conclusion

77. Standing back from the arguments and disputations about the rights and wrongs of the parties in relation to the numerous matters in dispute, I must remind myself that, ultimately, it is SG who has the burden to show that Eros had committed breaches of a repudiatory character justifying SG terminating the contract. On the facts, it seems to me that SG has fallen far short of discharging that burden. Eros' apparent breaches appear to have been largely induced by SG's own breaches.

78. In the result, SG fails in its claim, and Eros succeeds on its counterclaim. Eros shall have judgment for :

> (a) the sum of $71,097.14, being the agreed amount of the value of work done and not paid
>
> (b) the sum of $149,979.39 being loss of profit
>
> (c) the sum of $52,845.17 being the agreed amount the defendants have had to pay to their suppliers and contractors in settlement of claims
>
> (d) the sum of $14,053.17, the cost of the rainwater downpipe

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> (e) compensation for delay and short certification, to be assessed in manner indicated in the annex to this judgment.

79. I also award interest on the sums in items (a) to (d) above at the rate of 6% per annum from the date of the original counterclaim. The defendants have the costs of this action as a whole, as the issues in the claim and counterclaim are largely intertwined.

Warren L H Khoo

Judge

Warren Khoo L H J

Tai Chean Ming for the plaintiffs
Monica Neo for the defendants

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